

§ 548.306

(g) Section 548.3(e) is not applicable to employees employed at subminimum wage rates under learner certificates, or special certificates for handicapped workers, or in the case of employees in Puerto Rico or the Virgin Islands employed at special minimum rates authorized by wage orders issued pursuant to the Act.

[31 FR 6769, May 6, 1966]

§ 548.306 Average earnings for year or quarter year preceding the current quarter.

(a) Section 548.3(f)(1) authorizes as an established basic rate:

A rate per hour for each workweek equal to the average hourly remuneration of the employee for employment during the annual period or the quarterly period immediately preceding the calendar or fiscal quarter year in which such workweek ends, provided (i) it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during such prior period, including weekly hours of work, work assignments and duties, and the basis of remuneration for employment, were not significantly different from the terms, conditions, and circumstances of employment which affect the employee's regular rates of pay during the current quarter year, and (ii) such average hourly remuneration during the prior period is computed by the method or methods authorized in the following subparagraphs.

(b) There may be circumstances in which it would be impossible or highly impracticable for an employer at the end of a pay period to compute, allocate, and pay to an employee certain kinds of remuneration for employment during that pay period. This may be true in the case of such types of compensation as commissions, recurring bonuses, and other incentive payments which are calculated on work performance over a substantial period of time. Since the total amount of straight-time remuneration is unknown at the time of payment the full regular rate cannot be ascertained and overtime compensation could not be paid immediately except for the provisions of § 548.3(f). In many such situations, the necessity for any subsequent computation and payment of the additional overtime compensation due on these types of remuneration can be avoided and all overtime premium pay due

under the Act, including premium pay due on such a commission, bonus or incentive payment, can be paid at the end of the pay period rather than at some later date, if the parties to the employment agreement so desire. This is authorized by § 548.3(f)(1), which provides an alternate method of paying overtime premium pay by permitting an employer, under certain conditions, to use an established basic rate for computing overtime premium pay at the end of each pay period rather than waiting until some later date when the exact amounts of the commission, bonus, or other incentive payment can be ascertained. Such established rate may also be used in other appropriate situations where the parties desire to avoid the necessity of recomputing the regular rate from week to week.

(c)(1) The rate authorized by §§ 548.3(f)(1) is an average hourly rate based on earnings and hours worked during the workweeks ending in a representative period consisting of either the four quarter-years or the last quarter-year immediately preceding the calendar or fiscal quarter-year in which the established rate is to be used. Such a rate may be used only if it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during this prior period were not significantly different from those affecting the employee's regular rates of pay during the current quarterly period. Significant differences in weekly hours of work, work assignments and duties, the basis of remuneration for employment, or other factors in the employment which could result in substantial differences in regular rates of pay as between the two periods will render the use of an established rate based on such a prior period inappropriate, and its use is not authorized under such circumstances.

(2) However, an increase in the basic salary or other constant factor would not preclude the use of such a rate provided that accurate adjustments are made. For instance, assume that during the previous annual period an employee was compensated on the basis of a weekly salary of \$70 plus a commission of 1 percent of sales. If his weekly

salary is raised to \$80 for the next annual period (assuming he still receives his commission of 1 percent of sales) the annual rate on which the established rate is to be computed must be adjusted by an increase of \$520 (\$10×52 weeks). For instance, assume the above employee earned a total of \$4,244 and worked 2,318 hours during the previous annual period when his salary was \$70 per week. Normally his established basic rate would be computed by dividing 2,318 hours into \$4,244, thus arriving at a rate of \$1.83. However, since the rate must reflect the increase in salary it must be computed by adding the anticipated increase to the pay received during the previous annual period (\$4,244+ \$520=\$4,764). The established basic rate would then be \$2.05.

(d) Establishment of the rate explained in paragraphs (b) and (c) of this section is authorized under the circumstances there stated, provided it is computed in accordance with § 548.3(f)(2), which prescribes the following method: First, all of the employees' remuneration for employment during the workweeks ending in the representative four-quarter or quarter-year period immediately preceding the current quarter, except overtime premiums and other payments excluded from the regular rate under section 7(e) of the Act, must be totaled. All straight-time earnings at hourly or piece rates or in the form of salary, commissions, bonus or other incentive payments, and board, lodging, or other facilities to the extent required under section 3(m) of the Act and Part 531 of this chapter, together with all other forms of remuneration paid to or on behalf of the employee must be included in the above total. Second, this total sum must be divided by the total number of hours worked during all the workweeks ending in the prior period for which such remuneration was paid. The average hourly rate obtained through this division may be used as the established rate for computing overtime compensation in any workweek, in which the employee works in excess of the applicable maximum standard number of hours, ending in the calendar or fiscal quarter-year period following the four-quarter or quarter-year period used for determination of

this rate. This is authorized irrespective of any fluctuations of average straight-time hourly earnings above or below such rate from workweek to workweek within the quarter.

(e) As a variant to the method of computation described in paragraph (d) of this section, it is provided in § 548.3(f)(3), with respect to situations where it is not practicable for an employer to compute the total remuneration of an employee for employment in the prior period in time to determine obligations under the Act for the current quarter year, a one-month grace period may be used. This method is authorized, for example, in employment situations where the computation of bonuses, commissions, or other incentive payments cannot be made immediately at the end of the four-quarter or quarterly base period. If this one month grace period is used, it will be deemed in compliance with § 548.3(f)(1) to use the basic rate authorized therein for the quarter commencing one month after the next preceding four-quarter or quarter-year period. To illustrate, suppose an employer and employee agree that the employee will be paid for overtime work at one and one-half times a basic rate computed in accordance with § 548.3(f)(1), but on the pay day for the first workweek ending in the current quarter his records do not show all commissions earned by the employee in the preceding quarter. The employer and employee may therefore elect to use a one month grace period. This would mean that a basic rate for the quarter January 1–March 31, for example, which is derived from the prior four-quarter (January 1–December 31) or quarterly (October 1–December 31) period, as the case may be, would be applied during a quarterly period commencing one month later (February 1–April 30) than the period (January 1–March 31) in which it would otherwise be applicable. The same adjustment would be made in succeeding quarters. Once the grace method of computation is adopted it must be used for each successive quarter.

(f) The established basic rate must be designated and substantiated in the employer's records as required by part 516 of this chapter, and other requirements of such part with respect to

records must be met. An agreement or understanding between the parties to use such rate must be reached prior to the quarter-year period in which the work to which it is applied is performed. The agreement or understanding may be limited to a fixed period or may be a continuing one, but use of the established rate under such an agreement or understanding is not authorized for any period in which terms, conditions, and circumstances of employment become significantly different from those obtaining during the period from which the rate was derived. This method of computation cannot be used if there is any change in the employee's position, method of pay, or amount of salary or if the employee was not employed during the full period used to determine the rate.

(g) To function properly and to provide, over an extended period, overtime premium pay substantially equivalent to the pay the employee would receive if overtime were paid on the true regular rate, the plan must provide that overtime be computed on the established basic rate in every overtime week without regard to the fact that in some weeks the employee receives more premium pay than he would using the true regular rate and in some weeks less. Plans initiated pursuant to this section are based on averages and, if properly applied, will yield substantially the same overtime compensation in a representative period as the employee would have received if it were computed on the true regular rate.

(h) The following examples assume the employee is due overtime premium pay for hours worked over 40 in the workweek.

(1) *Example.* A sales employee whose applicable maximum hours standard is 40 hours enters into an agreement with his employer that he will be paid a salary plus a commission based on a certain percentage of sales. He agrees that this compensation will constitute his total straight-time earnings for all hours worked each week, provided such compensation equals or exceeds the applicable minimum wage.

The employee further agrees that he is to receive overtime premium pay for each workweek on the normal pay day for that week; based each quarter on

one-half his established basic rate derived by taking the hourly average of the total straight-time remuneration he received during the workweeks ending in the four-quarter period immediately preceding the current quarter. For example, his established basic rate for each workweek ending in the first quarter of 1964 (January through March) is determined by computing his average hourly rate for employment during all workweeks ending in the four quarter periods of 1963.

Assume the employee worked the following number of hours and received the straight-time pay indicated:

Line No.	Quarters	Pay		Hours worked	
1	1st—1963	\$1,074	.....	550	.....
2	2d—1963	980	\$980	480	489
3	3d—1963	1,069	1,069	542	542
4	4th—1963	1,365	1,365	619	619
5	1, 2, 3, 4—1963	4,488	.....	2,200	.....
6	1st—1964 .....	.....	1,168	.....	531
7	2, 3, 4 (1963) 1 (1964).	.....	4,582	.....	2,181

The employee's basic rate for the first quarter of 1964 (line 6) is determined by the hours worked and pay received in the four previous quarters (lines 1, 2, 3 and 4). Total pay received during that period (\$4,488.00, line 5) is divided by the total hours worked (2,200 hours, line 5) to derive the established basic rate (\$2.04 per hour). This is the hourly rate on which overtime is computed in each workweek ending in the first quarter of 1964 in which the employee worked in excess of the applicable maximum hours standard. For instance, if in the first week of that quarter the employee worked 47 hours he would be due his guaranteed salary, his commission (at a later date) plus \$7.14 as overtime premium pay (7 hours×2.04× 1/2). It does not matter that the employee actually earned and ultimately received \$90.71 in salary and commission as his total straight-time pay for that week and that his true hourly rate would be only \$1.93 (\$90.71÷47 hours). The established basic rate is an average rate and is designed to be used, and must be used, in every overtime week

in the quarter for which it was computed, without regard to the employee's true hourly rate in the particular week.

The employee's basic rate for the second quarter of 1964 will be similarly computed at the end of the first quarter of that year by adding together the hours worked and pay received in the second, third, and fourth quarters of 1963 and the first quarter of 1964 (lines 2, 3, 4 and 6) so that the totals now reflect the figures in line 7. The regular rate is again computed by dividing pay received (\$4,582.00) by hours worked (2,181) and the new basic rate would be \$2.10.

(2) *Example.* Assume that an employee employed under a similar arrangement agrees to receive overtime premium pay for each workweek on the normal pay day, based each quarter on one-half his established basic rate determined by the *quarterly* method rather than by the *annual* method previously discussed. His established basic rate for the first quarter of 1964 would therefore be determined by computing his average hourly rate for the *last quarter* of 1963. To illustrate, if in the latter quarter the employee received \$1,156.00 in straight time compensation and worked 561 hours, his basic rate for the first quarter of 1964 would therefore be \$2.06 (\$1,156.00÷561 hours). During the overtime weeks in this quarter there would be due him, in addition to his straight time compensation, premium pay of \$1.03 (\$2.06× 1/2) for each hour he works in excess of the applicable maximum hours standard.

As in the previous example the established basic rate must be used in every overtime week in the quarter for which it was computed without regard to the employee's true hourly rate in the particular quarter.

(Sec. 1, 52 Stat. 1060, 1062, as amended, 29 U.S.C. 201, *et seq.*)

[28 FR 11266, Oct. 22, 1963, as amended at 32 FR 3293, Feb. 26, 1967]

RATES AUTHORIZED ON APPLICATION

§ 548.400 Procedures.

(a) If an employer wants to use an established basic rate other than one of those authorized under § 548.3, he must obtain specific prior approval from the

Administrator. For example, if an employer wishes to compute overtime compensation for piece workers for each workweek in a 4-week period at established basic rates which are the straight-time average hourly earnings for each employee for the immediately preceding 4-week period, he should apply to the Administrator for authorization. The application for approval of such a basic rate should be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. No particular form of application is required but the minimum necessary information outlined in § 548.4 should be included. The application may be made by an employer or a group of employers. If any of the employees covered by the application is represented by a collective bargaining agent, a joint application of the employer and the bargaining agent should be filed. It is not necessary to file separate applications for each employee. One application will cover as many employees as will be paid at the proposed basic rate or rates.

(b) Prior approval of the Administrator is also required if the employer desires to use a basic rate or basic rates which come within the scope of a combination of two or more of the paragraphs in § 548.3 unless the basic rate or rates sought to be adopted meet the requirements of a single paragraph in § 548.3. For instance, an employee may receive free lunches, the cost of which, by agreement or understanding, is not to be included in the rate used to compute overtime compensation.¹⁷ In addition, the employee may receive an attendance bonus which, by agreement or understanding, is to be excluded from the rate used to compute overtime compensation.¹⁸ Since these exclusions involve two paragraphs of § 548.3, prior approval of the Administrator would be necessary unless the exclusion of the cost of the free lunches together with the attendance bonus do not affect the employee's overtime compensation by more than 50 cents a week on the average, in which case the employer and the employee may treat

¹⁷ See § 548.304.

¹⁸ See § 548.305.